

DENISE B. MOLINE, P.C.
100 Carpenter Drive, Suite 100
P.O. Box 217
Sterling, VA 20167-0217

Shipping Address:
100 Carpenter Drive, Suite 100
Sterling, VA 20164

Of Counsel
Putbrese, Hunsaker & Trent

Direct Telephone: 703-318-7605
Facsimile: 703-318-7606
Facsimile: 703-437-8483
Internet: DenniPC@aol.com

RECEIVED
 April 16, 1997
 APR 16 1997

FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF SECRETARY

Mr. William F. Caton, Acting Secretary
 Federal Communications Commission
 1919 M Street, N.W., Room 222
 Washington, D.C. 20554

Re: Informal Comments, WT Docket 97-82
Order, Memorandum Opinion and Order and Notice
Of Proposed Rule Making
 IVDS Enterprises, Joint Venture
 DBMPC #13114

Dear Mr. Caton:

IVDS Enterprises, Joint Venture, ("Enterprises") Licensee of several IVDS Licenses, by Counsel, respectfully submits the instant Informal Comments on the Commission's *Order, Memorandum Opinion and Order and Notice Of Proposed Rule Making*, WT Docket 97-82, released February 28, 1997.

Enterprises obtained its five IVDS licenses in the original July, 1994 IVDS Auction. It made its scheduled down payments, and has made installment payments to the Commission within the 90-day automatic grace periods provided under Section 1.2110(e)(4)(i). Enterprises has thus demonstrated its *bona fides* in connection with its IVDS Licenses.

Proposed Late Payment Penalty

In its *Notice of Proposed Rule Making* in this proceeding, the Commission proposed to amend the terms of installment payment plans to provide for late payment fees. The Commission's proposal would apply a late payment fee of 5% for any payment made after the scheduled due date, whether or not the payment is made within the automatic 90-day grace period available to designated entities on installment payment plans. The Commission's NPRM was not specific as to whether this change would apply to licensees already under existing

installment payment plans, or only to licensees awarded licenses in future auctions.

Enterprises opposes imposition of any late-payment penalty in connection with payment of its installment payments for its existing licenses until the expiration of the automatic 90-day grace period available under Section 1.2110(e)(4)(i).¹ Fairness requires that licensees who obtained their licenses under rules which did not specify such late-payment penalties during the grace period are entitled to rely upon those rules, and to have them apply for the full duration of the installment payment period. Countless IVDS Licensees and their legal representatives have been advised through informal telephone conversations with FCC Staff that payments made within the 90-day grace period are not considered to be 'late', and licenses not subject to revocation or cancellation until that period has expired with no payment having been made. Surely, revocation of a license should be sufficient penalty.

Additionally, it must be taken into consideration that, for existing licensees, financing arrangements which are already in place did not take the possibility of late-payment penalties into account, and imposition of such penalties mid-way through the installment payment period could well impose hardship on many IVDS Licensees. Even assuming that financing arrangements could be adjusted, this works an unnecessary hardship on IVDS Licensees who already have been subjected to unforeseen economic difficulties since the IVDS Auction itself. Notwithstanding the Commission's opinion to the contrary, IVDS Licensees have consistently maintained that they paid amounts in excess of the real value for their licenses because of the inflated bidding at the 1994 IVDS auction by the defaulting bidding winners. Moreover, those defaults threw an economic pall over the entire IVDS industry; many IVDS Licensees are still struggling with leery investors to gain the financial basis necessary for construction and operation, and have not even begun the process of arriving at joint ventures to achieve regional or even national service systems. The Commission has rejected all requests for economic relief for IVDS Licensees. Imposition of new and arbitrary financial obligations will result in a further distancing between IVDS Licensees and the necessary investment capital for implementation of service.

Enterprises notes that IVDS Licensees are particularly vulnerable to any proposed late-payment penalty. Even assuming that the new rule has prospective application only, it could

¹This assumes that the Commission will amend its rules to allow for an additional 90 day grace period to follow the existing 90-day grace period, in lieu of requiring Licensees to submit requests for additional grace periods. In this case, a 5% late-payment penalty could be fairly imposed for the second 90 day period. Enterprise opposes as exorbitant the imposition of a 10% late-payment penalty during such a second 90-day period.

easily be apply to remaining installment payments to be made by IVDS Licensees for existing licenses. No contract protection for IVDS Licensees exists by way of installment payment agreements with the Commission since the use of installment payment agreements was a procedure implemented by the FCC in connection with auctions held after the initial IVDS auction. Unlike Licensees in other services, IVDS Licensees cannot point to such contracts to preclude application of any new late-payment penalties for licenses already awarded. At a minimum, IVDS Licenses and existing installment plans previously issued by the Commission should be exempted from any new late-payment penalty, since this proposal was not part of the installment payment obligation to which IVDS Licensees agreed in connection with their licenses. Fairness dictates that IVDS Licensees be allowed to claim the benefit of the bargains into which they entered with the FCC, on the terms which existed at the time, regardless of whether those bargain were reduced to writing or not.

Grace Periods

In its *NPRM*, the Commission proposed to revise its rules to provide an additional automatic grace period of 90 days, in lieu of requiring licensees to file requests for additional grace periods. The Commission has stated that it does not have the resources to consider such requests. The Commission's proposal would make such an additional grace period available if the Licensee paid the proposed late-payment fee within the first 90-day period. The Commission would also impose an additional 10% late-payment penalty for the privilege of using such an additional grace period.

Enterprises has noted above that imposition of a 5% late-payment penalty during the first 90-day grace period would be inconsistent with existing installment payment plans and the underlying understandings with IVDS Licensees, and would be unfair. Enterprises submits that imposition of a late-payment penalty even for the second additional 90-grace period would be inconsistent with existing rules and arrangements which permit Licensees to file for additional grace periods and if granted, to make payments within that additional period without any late-payment penalty. Imposition of a 10% or even a 5% late-payment penalty during the second 90-day grace period would be exorbitant, and could be highly disruptive of Licensee financing and eventual service to the public. Penalties imposed by the FCC in other services for default payments, for example, do not exceed 3% of the bid, and no rationale for imposition of either a 5% or a 10% late-penalty payment as been suggested by the FCC in its Notice.

Enterprises agrees that an additional automatic grace period would alleviate the need for

most Licensees to file requests for additional grace time which the FCC has to process. However, Enterprises submits that substituting the additional 90 day period and thereby precluding Licensees from submitting such requests altogether would not be in the public interest, in that it would not allow Licensees any option whatsoever to preserve their licenses in the face of automatic cancellation, in the event that payments could not be delivered to the FCC by the end of the 180 day period. The Commission should continue to allow Licensees to submit such requests, but only at the end of the 180 day period, and only upon payment of interest accrued during the 180 day period. This would reduce the number of requests, since most Licensees could probably raise the necessary payments during the grace periods provided, but would provide Licensees with a forum in case of extraordinary circumstances.

Defaults on Installment Payments

The Commission has proposed that Licensees defaulting on installment payments should be subject to Section 1.2104(g) of the Commission's Rules. Again, Licensees, and especially IVDS Licensees, are entitled to rely on the rules applicable at the time they filed their applications and were awarded their licenses. In the event that the Commission decides to amend its rules to make Licensees who default on installment payments subject to the same defaulting penalties as Licensees who default on down payments and final payments, such provisions can only be applied prospectively to Licensees qualifying for installment payments in future auctions, and should not apply retroactively to existing Licensees.

Enterprises also opposes addition of any cross-default provision to the existing FCC default provisions. In new and emerging technologies, applicants and winning bidders assume the risk of development of a new industry, as well as of new facilities. Licensees must be free to make business judgments regarding which facilities, among numerous facilities that have been acquired, can and should be constructed in order to take advantage of technological developments in the new industry. The Commission has previously opined that it expects such business decisions to drive whether an applicant bids or not, but that once a license is acquired, Licensees must fulfill their payment obligations, whether their facilities are viable or not. In reality, however, the evolving circumstances which are endemic to the communications industry and to IVDS may result in the necessity for changes in business decisions after a license is awarded, as to whether a particular facility can feasibly be constructed, or whether operation will be economically viable in a particular location. In such circumstances, Licensees should be able to decide not to make, or to discontinue making, installment payments for a particular station and to allow that license to be canceled or revoked. In that case, defaults on such payments should

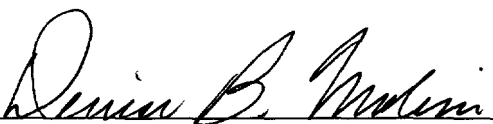
not affect a Licensee's other facilities, in the same service or in other services, where the Licensee has made regular installment payments for those other facilities. A Licensee should be liable only for penalties and payments for the particular facility on which it has defaulted. This approach will not threaten other facilities on which a Licensee has made regular payments, and which it obviously intends to pursue, and will promote more expeditious service to the public with respect to those facilities. A Licensee's qualifications to remain a Licensee with respect to facilities on which it makes timely payments should not be affected by defaults occasioned by a *bone fide* business decision to cease pursuit of a station in a particular market area. Cancellation of that license, and payment of appropriate penalties associated with the default should be considered sufficient punishment for the default.

Enterprises has also reviewed the Comments submitted by ISTA, and supports ISTA's position that IVDS should not be treated, for installment payment purposes, like PCS service; what is appropriate for the one service may not be appropriate for the other, especially considering the disparity in values paid at auction for these services, the substantial economic and investor disruption caused by the defaults in IVDS service, and the history of confusion with respect to installment payments that has been rampant in the IVDS service. IVDS should be exempted from the punitive measures proposed by the Commission; at a minimum, none of these measures should be applicable to existing licenses, and should be applied only with respect to future auctions and future licenses in this service.

Enterprises requests that the Commission take these Comments into consideration together with other Comments submitted in this proceeding.

Respectfully submitted,

IVDS ENTERPRISES, JOINT VENTURE

By: 

Denise B. Moline, Esq.

Its Attorney